Supreme
OCT 2 - 2005
OFFICE OF THE CLERK

No. 05-4

In The

Supreme Court of the United States

STEVEN SMITH,
Commercially licensed driver/employee,

Petitioner,

v.

CONSOLIDATED FREIGHTWAYS, INC.,
Common carrier/self-insured employer,

Respondent.

On Petition for Rehearing
To the Supreme Court of the United States

Petition for Rehearing

Mary Ellen Chajkowski, Esq.
Petitioner's Counsel of Record
Pennsylvania ID# 86611
5510 Hobart Street
Pittsburgh, PA 15217
412-904-2222

QUESTIONS PRESENTED

I.

Whether Petitioner may challenge jurisdiction?

ANSWER: Yes.

II.

Whether Petitioner's Statutory and Constitutional Due Process Claims Warrant a *Writ of Certiori*?

a) Rule 29.6 Disclosure;
b) Heightened Standards of Review;
c) Motion to Dismiss Construction;
d) Respondent Admissions;
e) Pennsylvania Authority.

ANSWER: Yes.

III.

Whether Respondent's Contest of Petitioner's Claim, Inconsistent With Its OSHA Compliance Agreement Based on Same Operative Facts, Constituted Fraud?

ANSWER: Yes.

PARTIES

STEVEN SMITH,
Commercially licensed driver/employee,

Petitioner,

v.

CONSOLIDATED FREIGHTWAYS, INC.,
Common carrier/self-insured employer,

Respondent.

TABLE OF CONTENTS

Questions presented.....i

Parties.....ii

Table of Contents.....iii

Table of Authorities.....iv

Statutes and Constitutional Provisions.....v

Certification of Counsel.....vi

Order Reviewed to be Reviewed.....vii

Jurisdictional Statement.....vii

Summary of the Argument.....1

Argument.....2

a) Jurisdiction 2

b) Due Process Claims
   1. Rule 29.6.....3
   2. Heightened Std. Review.....5
   3. Motion to Dismiss.....6
   4. Respondent Admissions.....7
   5. Pennsylvania Authority.....9

c) Inconsistent Legal Positions.....10

Conclusion.....10

Appendix **II** – *See under separate cover.*

TABLE OF AUTHORITIES

Cases

Angelastro v. Prudential-Bache, 764 F.2d 939, 944 (3d Cir.), cert. denied, 474 U.S. 935, (1985). 6

Black v. Cutter Laboratories, 43 Cal. 2d 788, 798, 278 P. 2d 905, 911 (1953). 10

Carey v. Piphus, 435 U.S. 247 (1978) *citing* Boddie v. Connecticut, 401 U.S. 371, 373 (1971).....4

City of Philadelphia v. Lead Industries Assn., Inc., Nos. 92-1419, 92-1420, 92-1463, (3d Cir. 1993), *citing* Conley v. Gibson, 355 U.S. 45 (1957).....6

Fuentes v. Shevin, 407 U.S. 67 (1972).....8

Giant Eagle v. Workers' Com. Appeal Bd. (Myers), 578 Pa. 94, 103-104 (Pa. Sup. Ct. 2004), *citing* Kachinsky v. Workers' Comp. Appeal Bd. (Vepco Co.), 532 A.2d 374 (Pa. Sup. Ct. 1987).....9

Haring v. Prosise, 462 U.S. 306 (1983).....6

Hockenberry v. Workers' Comp. Appeal Bd., 672 A.2d 393 (Pa. Cmwlth. 1996). 9

Pinto v. Reliance Standard Life Ins. Co., 214 F3d 377 (3d Cir. 2000). 5

The Supreme Court of the United States,
Rule. 29.6.....3
Rule 44.....vii

Statutes

Rules of the Supreme Court of the United States,

Rule 44.....vi

Rule 29.6 2

U.S.C.A. Const. Art. III sec. 2, cl.2 .....*Passim.*

28 U.S.C.A. sec. 1257(a) .....*Passim.*

U.S. Const. Amend. XIV.....*Passim.*

***Se* Appendix I**

Hazard Communication Regulation,
29 C.F.R.1910.1200(b)(4)(ii), 1910.1200(f).....32

Hazardous Materials Regulations, 49 C.F.R. 171....33

Interstate Transportation Statute,
75 Pa. Cons. Stat. Ann. s.8301 *et seq.* 43

Pennsylvania Workers' Compensation Act,
77 P.S. s. 775 *et seq.* 38

CERTIFICATION OF COUNSEL

I certify this Petition for Rehearing is restricted to Intervening and Substantial grounds not previously presented; and that I present this Petition for Rehearing in good faith and not for delay.

This action must be construed as a bundle of statutory rights and duties, arising from a workers' compensation claim for payment of medical expenses and disability wages, where CDL Petitioner's mucous membrane was damaged by Respondent's shipment of unmarked/damaged containers of Dioxane poison. A toxic accident, cited/fined by OSHA and settled by Agreement with Respondent, that was never enforced.

Substantial Grounds

Respondent Rule 29.6 Corporate disclosure;
Correct the Application of Law to Motion to Dismiss;
Enforce Respondent's Agreement;
Strict scrutiny standard of review to Petitioner;
Arbitrary/capricious review to self-insured employer.

Intervening Grounds

Petitioner recently learned that an associate attorney of Respondent's Counsel was cited in 2005 by the state disciplinary board and sanctioned by the Pennsylvania Supreme Court for misrepresentations. It is material to this action, as the legal work of the sanctioned associate was concentrated in defending workers compensation matters on behalf of insurance companies and self-insured companies, as here.

Respectfully submitted,

Mary Ellen Chajkowski, Esquire

JURISDICTIONAL STATEMENT

Order to be Reviewed

Steven Smith v. Consolidated Freightways, No. 05-4, (The Supreme Court of the United States 2005), the Petition for *Writ of Certiori* denied, October 3, 2005.

Statutes Conferring Jurisdiction

Rules of the Supreme Court of the United States,

Rule 44, Petition for Rehearing,
Substantial Grounds not previously presented, and Intervening Grounds.

Rule 29.6 Corporate Disclosure.

Rule 10 (a) and (c).

The Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such Regulations as the Congress shall make. U.S.C.A. Const. Art. III s2, cl.2

Cases in the courts of appeals may be reviewed by the Supreme Court by: (1) *writ of Certiori* granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree. 28 U.S.C. s.1254 (1988).

U.S. Const. Amend. XIV, section 1 "....nor shall any State deprive any person of life, liberty, or property, without due process of law.

SUMMARY OF THE ARGUMENT

CDL employee v. Self-insured employer.

Self-insured Respondent did not deny Petitioner was unfit to return to work, it denied that Petitioner's disability was work related. Self-insured Respondent's dishonest representations to the courts must be construed against its Motion to Dismiss Petitioner's un-litigated allegations of perjury and fraud, as the Chemrex Material Safety Date Sheets (MSDS) in Respondent's possession contradict its expert report on the wrong chemical; and Respondent's contest of Petitioner's medical expenses.

Petitioner, a thirty-year employee, was denied emergency medical treatment, lost wages, payment of costs, medical expenses, attorney fees, a $5,000 disability insurance policy, and a $1,000 (one thousand) monthly pension penalty.

Self-insured Respondent falsely asserts in its Brief in Opposition to Petition for *Writ of Certiori* that there was a stipulation on the term of Petitioner's disability, as there was no hearing on the issue. *See* Appendix II, p. 133, hearing transcript. Further, there is an ERISA subrogation issue, *see* Appendix II, p. 17, from the union health and welfare fund.

Petitioner reasonably Petitions for Rehearing and requests proper application of law and construction to Respondent's Motion to Dismiss as *res judicata,* un-litigated allegations of perjury and fraud, applying a heightened standard of review to each party, and enforcing this honorable court's Rule 29.6 Corporate Disclosure.

PETITIONER'S ARGUMENT

CDL employee v. Self-insured employer.

The Department of Labor granted Petitioner's 2001 Claim Petition, requesting a hearing to admit relevant evidence, Chemrex Material Safety Data Sheets (MSDS) and Health Assistance for Personnel in Industry (HAPPI) medical records, withheld by Respondent in its Contest of Petitioner's 1996 hazardous material (HM) exposure and injury Claim.

Petitioner herein appeals state court decisions granting Respondent's 2001 Motion to Dismiss un-litigated allegation of perjury and fraud, where self-insured Respondent:

- Withheld Chemrex Material Safety Data Sheets. *See* Appendix II, [herein **II**], at p.1;
- Filed false and/or misleading LIBC Notice of Denial, **II**, p.85 and Answer **II**, p. 91.
- Its counsel disputed that Petitioner was exposed to 'poison', contrary to Chemrex MSDS. **II**, p.122;
- Its counsel denied HM shipment was damaged, contrary to OSHA citation/fines for damaged containers of Dioxane. **II**, p.132;
- Withheld Petitioner's 1996 HAPPI panel records, finding Petitioner unfit to return to work. **II**, p.29-36;
- Contested or refused to pay HAPPI medical expenses;
- Submitted a report, **II**, p.97,on a different chemical, which did not incorporate Chemrex MSDS or its Dioxane, **II**, p.37,(CAS No. 123-91-1) component. .
- Failed to Answer, statutory admissions. **II**, p.51.

Self-insured Respondent contested Petitioner's Claim and entered a Compliance Agreement with the Department of Labor, taking inconsistent legal positions arising out of the same operative facts. Failure to construe perjury and fraud allegations in favor of Petitioner may be evidence of *bias*.

Pennsylvania courts failed to equitably enforce the statutory rights and duties of the parties in this action, including 'Right to Know' laws. **II**, p.15. Where courts may not comprehend technical matters, the constitutional duty to enforce procedure provides equitable opportunity to prove or disprove party allegations and responses.

I. Subject Matter Jurisdiction.

Petitioner has 'standing' to challenge jurisdiction. Work injured claimants may file Petitions within 300 weeks of work injury, which Petitioner did.

Respondent's Counsel of Record raised ambiguity regarding Respondent's 'standing' by stating at a hearing before the Appeal Board in June 2005, that Respondent is out of business and out of contact with the counsel of record.

Respondent's Counsel of record sent an April 2004 letter to Petitioner's Counsel, **II**, p. 17, which referred to a directive by an unidentified "client" requesting that a report be filed against Petitioner's Counsel with the Pennsylvania Disciplinary Board. Respondent has successors and affiliates, a 2003 Bankruptcy Notice was sent to Petitioner, **II**, p.57.

II. Fourteenth Amendment Due Process.

a) Rule 29.6 Corporate Disclosure.

Respondent failed to include its Corporate disclosure in its Brief in Opposition to Petition for *Writ of Certiori*, a Rule 29.6 filing requirement of the U.S. Supreme Court:

> "Every document, except a joint appendix or *amicus curiae* brief, filed by or on behalf of a non-governmental corporation shall contain a corporate disclosure statement identifying the the parent corporations and listing any publicly held company that owns 10% or more of the corporation's stock.
>
> If there is no parent or publicly held company owning 10% or more of the corporation's stock, a notation to this effect shall be included in the document." Rule 29.6 Corporate Listing.

Self-insured Respondent's Notice of Bankruptcy was mailed to Petitioner in 2003. *See* **II,** p.57.

June 2005, at a hearing before the Appeal Board, Respondent's Counsel stated that Respondent was out of business and out of contact with counsel, which Petitioner refuted by mailing a copy of Counsel's April 29, 2005 letter **II**, p. 17, referring to "client" contact directing counsel of record to file professional conduct charges against Petitioner's counsel.

An Intervening Ground for Rehearing, here, is that an associate attorney working for Respondent Counsel's firm was sanctioned June 16, 2005 upon Recommendation of the state Disciplinary Board to the state Supreme Court, citing a pattern of misrepresentations. That associate charge is relevant to this action, as the report stated that legal work of the sanctioned associate was concentrated in defending workers compensation matters on behalf of insurance and self-insured companies.

Self-insured Respondent is a corporation, Rule 29.6 is relevant and Petitioner requests enforcement of the rule.

"Procedural due process rules are meant to protect persons not from deprivation, but from mistaken or unjustified deprivation of life, liberty or property." U.S.C.A. Const. Amend. 14. Carey v. Piphus, 435 U.S. 247 (1978) *citing* Boddie v. Connecticut, 401 U.S. 371, 375 (1971). "The right to procedural due process is 'absolute' in the sense that it does not depend upon the merits of a claimant's substantive assertions, and because of the importance to organized society that procedural due process be observed, we believe that the denial of procedural due process should be actionable without proof of actual injury." Id. Self-insured Respondent litigated to avoid its statutory liability to pay medical expenses. The 1996 Contest of this Claim is contrary to MSDS scientific information and medical records of HAPPI panel providers finding Petitioner unfit to work.